UNITED MALAYAN BANKING CORP BHD

v.

CHEN YIN KHEE & ANOR

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-382-1996]
13 OCTOBER 2004

CONTRACT: *Claim for moneys owing - Proof - Continuing guarantee and indemnity from directors as security for loan to company - Whether bank has established proof of indebtedness - Whether bank must tender full and complete accounts - Evidence of exact amount due and owing - Overdue interest*

This was an appeal by the plaintiff/bank from the decision of the High Court dismissing its claim on a continuing guarantee and indemnity ('the guarantee') against the defendants. The High Court had dismissed the plaintiff's claim on the ground that it did not prove the amount due under the guarantee. (The guarantee was one of the securities provided by the defendants for a RM200,000 loan facility granted by the plaintiff to a company of which the defendants were the directors.) The only issue that arose for decision before the justices of appeal herein was whether the sum claimed by the plaintiff was proved – regard being had to both the oral and the documentary evidence adduced at the trial.

Held (dismissing the appeal)
Per Siti Norma Yaakob JCA delivering the judgment of the court:

[1] Apart from tendering the guarantee and two notices of demand, the plaintiff did not produce any accounts to establish the amount due as from the defendants. The High Court was therefore right in rejecting the plaintiff's claim in the light of such scanty 'proof of indebtedness' and unsatisfactory evidence. This was a claim for moneys owing based on accounts as kept by the plaintiff; as the particulars of the accounts were strenuously disputed by the defendants, it was of utmost importance that the plaintiff produced all the relevant accounts to establish the defendants' liabilities. (The initial amount claimed by the plaintiff, as per its statement of claim, was RM248,377.65 as at 13 August 1987, but the amount had swelled to RM804,255.82 as at the date of the trial. This increase, whether owing to overdue interest or otherwise, was also not evidentially substantiated by the plaintiff.) (pp 387 f, h & 388 a-e)

[Decision of High Court affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh plaintif/bank terhadap keputusan Mahkamah Tinggi kerana menolak tuntutannya terhadap defendan-defendan yang didasarkan kepada suatu indemniti dan gerenti berterusan ('gerenti'). Mahkamah Tinggi telah menolak tuntutan plaintif atas alasan bahawa plaintif gagal membuktikan amaun yang terhutang di bawah jaminan. (Gerenti merupakan sebahagian dari sekuriti yang kemukakan oleh defendan-defendan untuk kemudahan pinjaman berjumlah RM200,000 yang diberikan oleh plaintif kepada sebuah syarikat di mana defendan-defendan adalah pengarah-pengarahnya.) Satu-satunya isu yang berbangkit di hadapan yang arif hakim-hakim rayuan di sini adalah sama ada jumlah yang dituntut plaintif telah dibuktikan – mengambilkira kedua-dua keterangan lisan dan dokumentari di perbicaraan.

Diputuskan (menolak rayuan)
Oleh Siti Norma Yaakob HMR menyampaikan penghakiman mahkamah:

[1] Selain dari mengemukakan gerenti dan dua notis tuntutan, plaintif tidak mengemukakan sebarang akaun untuk membuktikan jumlah yang masih terhutang oleh defendan-defendan. Mahkamah Tinggi dengan itu betul apabila menolak tuntutan plaintif dalam keadaan 'bukti keberhutangan' yang longgar dan keterangan yang lemah tersebut. Ini adalah tuntutan terhadap wang terhutang yang didasarkan kepada akaun-akaun yang disimpan oleh plaintif; dengan itu, oleh kerana butir-butirnya dipertikai dengan keras oleh defendan-defendan, maka adalah penting bahawa plaintif mengemukakan semua akaun yang relevan bagi membuktikan liabiliti defendan-defendan. (Jumlah awal yang dituntut plaintif, mengikut penyata tuntutan, adalah RM248,377.65 setakat 13 Ogos 1987, tetapi telah melambung naik hingga RM804,255.82 pada tarikh perbicaraan. Kenaikan ini, sama ada disebabkan faedah tertunggak atau lain-lain faktor, juga tidak dibuktikan oleh plaintif.)

Keputusan Mahkamah Tinggi disahkan.]

Case(s) referred to:
*Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC **(refd)***

For the appellant - Hira Singh (Brian Cummings); M/s Asbir, Hira Singh & Co
For the 1st respondent - Damian Lim; M/s Chin & Rakarakan
For the 2nd respondent - Loo Shin Mun; M/s Shinmun & Assoc

Reported by Gan Peng Chiang

JUDGMENT

Siti Norma Yaakob JCA:

We had dismissed this appeal with costs and we now give our reasons for arriving at that decision.

The appellant's cause of action against the respondents is on a continuing guarantee and indemnity dated 20 September 1985, being one of the two securities provided by the respondents for an additional fixed loan facility of RM200,000 granted by the appellant to Messrs. Chai Foo Sdn. Bhd. ("the company"). The respondents were the Directors of the Company at the material time and the other security provided was a second legal charge over land belonging to the company.

The High Court dismissed the appellant's claim on the ground that it had failed to prove the amount due under the guarantee and indemnity. As such the only issue before us was whether the sum claimed by the appellant had been proven. This must be reflected in the evidence both oral and documentary adduced at the trial.

The proof of indebtedness came from SP1, the only bank officer called by the appellant, and apart from stating that she had knowledge of the loan involved also testified that both the company and the respondents made no payment towards the additional loan. She then produced the guarantee and indemnity that was executed by the respondents and two notices of demand that were separately sent to them. She concluded her examination-in-chief by stating the amount due as at the date of her testimony.

When cross-examined by the 1st respondent she revealed that the appellant had granted two facilities to the company but the respondents were sued in respect of the second additional facility of RM200,000.

The 2nd respondent did not cross-examine her and neither offered any evidence on his behalf. As such, the sum total of the appellant's case rested on SP1's testimony in her examination-in-chief and cross-examination. She did not produce any account to establish the amount due from the respondents.

It is not disputed that the land charged to the appellant had already been sold by public auction but there is no evidence to show whether the proceeds of sale had been utilized to offset the amounts due from either of the two loans.

It was in the light of such scanty and unsatisfactory evidence that the High Court dismissed the appellant's claim and we entirely agree.

As this is a money claim based on accounts kept by the appellant, particulars of which are strenuously disputed by the respondents it is of utmost importance that the appellant produce all the accounts to establish the respondent's liabilities. This is more so when the amount claimed in the Statement of Claim is for RM248,377.65 as at 13 August 1987, but at the date of trial, the amount had arisen to RM804,255.82 and SP1 had not explained how the initial claim had accumulated to more than sevenfold. If the accumulation was as a result of overdue interest the amount of such overdue interest should have been stated and proven by way of the appellant's accounts. This was not done, and the sum of RM804,255.82 has not been substantiated. See the case of *Popular Industries Limited v. Eastern Garment Manufacturing Sdn. Bhd.* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635.

Added to this is the absence of evidence as to the utilization of the proceeds of sale of the charged property. This is a very relevant piece of evidence for if such proceeds had been utilized to offset the company's liability for the second fixed loan, it would surely affect the respondents' liabilities under the guarantee and indemnity.

The fact that the 2nd respondent did not cross-examine the appellant's only witness or led any evidence cannot be taken as an act of abandoning his defence as at the stage of the appellant's case the burden of proof lies with the appellant and since it had failed to produce any *prima facie* evidence to establish the 2nd respondent's indebtedness, he is not expected to fill in the gaps in the appellant's claim. The 2nd respondent committed no procedural wrong by submitting no case to answer at the end of the appellant's case and electing to produce no evidence to support his defence.

For the reasons that appear in this judgment, we see no reason to interfere with the High Court's decision and we had accordingly dismissed this appeal with costs and ordered that the deposit be paid out to the 1st respondent to account of his taxed costs.